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Majoritarian and Counter-Majoritarian Difficulties: Democracy, Distrust, and Disclosure in American Land-Use Jurisprudence - A Response to Professors Mandelker and Tarlock's Reply

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MAJORITARIAN AND COUNTER-MAJORITARIAN DIFFICULTIES: DEMOCRACY, DISTRUST, AND *DISCLOSURE* IN AMERICAN LAND-USE JURISPRUDENCE—A RESPONSE TO PROFESSORS MANDELKER AND TARLOCK'S REPLY

*Robert J. Hopperton**

I. INTRODUCTION

Professors Daniel R. Mandelker and A. Dan Tarlock, in their recent article in this journal entitled *Two Cheers For Shifting the Presumption of Validity: A Reply to Professor Hopperton*,[1] strike a Churchillian chord in their defense of a presumption-based approach to judicial review of land-use regulations, i.e., presumption shifting may be an "imperfect"[2] basis for activist judicial review, but it is better than the alternatives. They make a good case by offering some new and well-drawn points. In this regard, they are addressing the need to "develop a theory of judicial review that would constrain but not chill"[3] local non-judicial land-use decision-makers. In this effort, Professors Mandelker and Tarlock are addressing a majoritarian difficulty—how to supervise through judicial review potential mischief by local officials elected by or responsive to majoritarian processes. To address their distrust of local officials, Mandelker and Tarlock argue for the "imperfect"[4] but serviceable approach of presumption shifting.

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[1] Daniel R. Mandelker & A. Dan Tarlock, *Two Cheers for Shifting the Presumption of Validity*, 24 B.C. ENVTL. AFF. L. REV. 103 (1996).

[2] *Id.* at 111.

[3] *Id.*

[4] *See id.*

My concern in the article[5] that they are responding to, on the other hand, relates to a different question, a question-precedent to the one they address: how do we constrain *judges* as they exercise the power of judicial review, especially when the exercise of that power inevitably involves those judges in a tangled "web of subjectivity?"[6] I am concerned about the counter-majoritarian difficulty—how to limit personal predilections of unelected, life-tenured Justices.[7] To address my concern about distrust of judicial decision-makers, I advocate a "disclosure principle" that extends a core principle of the Harvard Legal Process School of Jurisprudence.[8] In short, Professors Mandelker and Tarlock and I are focusing on two different, but related concerns.

Before going on, I wish to add that I am perplexed by an aspect of Professors Mandelker and Tarlock's "Reply." They expend substantial effort taking me to task for seeking heightened or activist judicial review[9] and for the "thesis that strict scrutiny rather than a presumption-shift is the best standard for judicial review."[10] I am perplexed because I was careful in my "*Presumption of Validity*" article[11] *not* either to propose or make arguments in favor of a "new and undefined non- or quasi-constitutional theory of heightened scrutiny" that they attribute to me.[12] Rather, my project was to question the efficacy of presumption-shifting in land-use jurisprudence, to urge Professors Mandelker and Tarlock and others to re-think that position, and to argue that courts should seek "clarity, coherence, and integrity" regarding the standards of judicial review deployed in their land-use opinions.[13] As will be seen in Sections IV through VII of this "Response" to Professors Mandelker and Tarlock, I return to that endeavor herein.

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[5] *See generally* Robert J. Hopperton, *The Presumption of Validity in American Land-Use Law: A Substitute For Analysis, A Source of Significant Confusion*, 23 B.C. ENVTL. AFF. L. REV. 301 (1996).

[6] *See infra* Section IV.

[7] *Id.*

[8] *See* BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER 158–61 (1994); *see also infra* Section IV.

[9] Mandelker & Tarlock, *supra* note 1, at 106, 110–11.

[10] *Id.* at 108.

[11] Hopperton, *supra* note 5.

[12] Mandelker & Tarlock, *supra* note 1, at 111.

[13] Hopperton, *supra* note 5, at 323–24.

II. CONSTITUTIONAL CHOICES: THE SOUND AND THE FURY

The Constitution presents all of us with an unending series of choices. We are called upon to choose what "the Constitution" is to include: *Text? Intentions? (Whose?) Structural inferences? (Which ones?) Political and moral premises? (Of what sort?).*[14]

—Laurence H. Tribe

Professors Mandelker and Tarlock in their recent article in this journal[15] offer an intriguing "choice" regarding the application of constitutional theory to judicial review of American land-use regulations. Their article is a reply to my response[16] to an earlier article of theirs.[17] In both of their pieces, they advocate use of the presumption of validity as a starting point for land-use jurisprudence and then, importantly, presumption-shifting as a defensible method of heightened or activist judicial review designed to constrain but not chill local land-use regulatory initiatives. Mandelker and Tarlock are interested in constraining local regulations that create barriers to affordable housing and non-traditional families, or that introduce malfunctions into the zoning process.[18] In general, their choice is a revised and updated variety of the process-based approach to constitutional theory first articulated in the famous *Carolene Products* footnote[19] and refashioned and expanded in John Hart Ely's lucid and controversial 1980 book, *Democracy and Distrust.*[20]

In my 1996 article in this journal,[21] I took issue with the cornerstones of Mandelker and Tarlock's chosen approach—the presumption of validity and the technique of presumption-shifting. I argued that presumptions in the arena of land-use jurisprudence have been more a source of confusion than clarity and that frequently they are a substitute for reasoned decision-making. I suggested that the more important question is the standard of judicial review that a court

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[14] LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 267 (1985).

[15] Mandelker & Tarlock, *supra* note 1.

[16] Hopperton, *supra* note 5.

[17] Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW 1 (1992).

[18] *See id.* at 14–18.

[19] *See id.* at 18–49; *see also* Mandelker & Tarlock, *supra* note 1, at 104–05; United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

[20] John Hart Ely, DEMOCRACY AND DISTRUST (1980). *See* Mandelker & Tarlock, *supra* note 17, at 27; *see also* Mandelker & Tarlock, *supra* note 1, at 104–05.

[21] Hopperton, *supra* note 5.

As they indicated in their 1992 article in the *Urban Lawyer*,[27] Professors Mandelker and Tarlock are concerned about "regulation that needs to be discouraged,"[28] and that the officials of local units of government "possess both the power to redress the serious external costs of land development and to do great mischief by distorting regional social inequities and by shifting spillovers from one jurisdiction to another."[29] They are interested in how the courts can constrain these local actions but not chill local regulatory impulses, recognizing that local officials,[30] both legislators and administrators, can do both good and evil. They seek ways in which courts can effectively supervise local units of government so as to discourage exclusionary tendencies but encourage otherwise sound regulatory efforts. As they indicate, they are concerned primarily with the difficulties of local, "majoritarian tyranny."[31] To this end, they assert that:

> Our modest argument in *Shifting the Presumption of Validity* boils down to this: the emphasis on the occasions when courts should shift the presumption of validity or constitutionality, i.e., to place a *greater* burden of justification on the local government, has two primary merits. First, it is a positive theory. It helps explain what courts are in fact doing. Second, it also is a useful normative *starting point* to construct a theory of judicial review because it focuses attention on the crucial issue in land-use litigation: what level of justification for a decision should be expected from a local government when a court suspects a process failure?[32]

Here Mandelker and Tarlock are dealing with the majoritarian difficulty, i.e., actions by local governmental officials who are either elected or responsive to elected officials. In this pursuit, they concede that the merits of presumption analysis are "marginal and subtle"[33] but go on to rehabilitate their approach by comparing and contrasting it to the alternatives.

> But, compared to the other available approaches, we think that they are substantial and merit judicial attention. The fit between classic presumption law and land-use litigation is not ideal. As we and Professor Hopperton point out, the use of a procedural device

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[27] Mandelker & Tarlock, *supra* note 17.
[28] *Id.* at 4.
[29] *Id.*
[30] Mandelker & Tarlock, *supra* note 1, at 111.
[31] *Id.* at 104.
[32] *Id.* at 107.
[33] *Id.*

> to supply gaps in evidence is ill-suited for the mixed questions of fact and judgment that characterize land-use decisions.[34]

To overcome these reservations, Mandelker and Tarlock offer three justifications for their support of a presumption based approach. First, they point out that the presumption is constitutionally-based and thus is a permanent feature of land-use law. Second, given the uncertainty about appropriate standards of judicial review, a presumption-based approach, they assert, provides better guidance to local non-judicial decision-makers (because it places a higher burden of justification on local authorities) than do other available approaches to heightened or activist judicial review. Third, they suggest the presumption-based approach works in both constitutional and non-constitutional land-use cases, whereas (they believe) heightened or activist judicial scrutiny ultimately works only in constitutional settings.[35]

Mandelker and Tarlock conclude with the following:

> The issue in disputed land-use cases is the level of justification that the local government must provide, not the interest of the party challenging the decision. The use of a presumption shift, imperfect as it is, can both "teach" local governments how to do it correctly and provide a necessary basis for both landowners and third parties to challenge a local decision when a local government cannot adequately explain a decision that is at variance with accepted planning theory and practice.[36]

Professors Mandelker and Tarlock's defense of a presumption-based approach in their second article is careful and thoughtful. As a result, their article leads to the following observations. If Dan Mandelker and Dan Tarlock were sitting on the Supreme Court one would have little concern about subjectivity and inconsistency. They would state their premises, argue through to their conclusions, while considering implications along the way. One would have utmost confidence in their ability and willingness to disclose with reasoned elaboration their approach to the standards of judicial review whether it was presumption-based, or rights-based, or entailed some other approach. Further, one would have little concern about a web of subjectivity[37] or a pattern of inconsistency.[38]

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[34] *Id.*

[35] Mandelker & Tarlock, *supra* note 1, at 108–10.

[36] *Id.* at 111.

[37] *See infra* Section IV.

[38] *Id.*

Unfortunately, Dan Mandelker and Dan Tarlock, as yet at least, do not sit as justices on any supreme court.

IV. The Counter-Majoritarian Difficulty and the Personal Predilections of Justices

Thus the central function, and it is at the same time the central problem, of judicial review: a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like.[39]

—John Hart Ely

Mandelker and Tarlock want to use judicial review to sanction or penalize local officials when they misbehave. In these circumstances, unelected, life-tenured Justices are trumping local elected representatives and officials who are responsible to local electoral processes. This is apparently inconsistent with the fundamental principle that the will of the majority should prevail in a democracy. As Alexander Bickel asserted over thirty years ago, judicial review is a "counter-majoritarian force"[40] in our system.

Not only are there anti-democratic implications to judicial review, but as Justice Lewis Powell asserted, "there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court."[41] In the same vein, Professor Bickel was concerned about the "web of subjectivity,"[42] i.e., the Court's tendency toward "erratic subjectivity of judgment, for analytical laxness, for what amounts to intellectual incoherence in many opinions, and for imagining too much history."[43] Moreover, Professor Tribe has suggested that Justices may manipulate "technical requirements to ensure a day in court for powerful interest groups while shutting the door on people with causes for which [they have] little sympathy."[44] Perhaps Justice Robert H. Jackson best summarized the combined concerns regarding the counter-majoritarian difficulties, personal predilections of Justices, and the concerns regarding the web of subjectivity, when he said, "It is hard

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[39] Ely, *supra* note 20, at 4, 5.

[40] Alexander Bickel, The Least Dangerous Branch 16 (1962).

[41] Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977).

[42] *See* Alexander Bickel, The Supreme Court and the Idea of Progress 44 (1978).

[43] *Id.* at 45.

[44] Laurence H. Tribe, God Save This Honorable Court 122 (1985).

to resist the temptation to label anything we do not like as unconstitutional."[45]

There are noteworthy examples of counter-majoritarian concerns and possible examples of personal predilections, subjectivity, and inconsistency in Supreme Court land-use cases both recent and historical. Some recent professional commentary focuses on Justice Scalia.

In a 1993 article critiquing the majority opinion in *Lucas v. South Carolina Coastal Council*,[46] Professor William W. Fisher, III first describes the conventional view of Justice Scalia: "He is typically portrayed as a brilliant, systematic ideologue. During his career as a law professor, it is commonly asserted or assumed, he developed a detailed and consistent constitutional vision."[47] Fisher then offers a different interpretation of Justice Scalia:

> An examination of Justice Scalia's "takings" opinions—of which the majority opinion in *Lucas* is the most recent—casts upon doubt about the foregoing characterization of his jurisprudence. He surely has a strong set of political inclinations, most of which could be described as libertarian. But those inclinations are not connected to a stable constitutional theory. Instead, Justice Scalia selects from a large and eclectic set of constitutional principles those that best suit his purposes in a given case. If the principles he employs in one case prove inconvenient in the next, he casually abandons them. The result is that, although it is usually easy to predict how he will vote in a constitutional case, it is often difficult to predict how he will justify his vote.[48]

Fisher goes on to analyze various aspects of Scalia's opinion in *Lucas*, such as his treatment of constitutional history, his discussion of conceptual segmentation (the "denominator issue"),[49] his creation of the nuisance exception to the new total regulatory takings rule of *Lucas*,[50] and his cynical view of legislators.[51] Fisher concludes that Scalia's takings jurisprudence is in fact anything but systematic and consistent. Fisher suggests, charitably perhaps, that while the source

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[45] *See* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 825 (1991) (quoting Louisiana v. Resweber, 329 U.S. 459 (1947) (Jackson, J., draft concurrence) (Dec. 1946) (LOC, Jackson Papers, Box 138, case file no. 142)).

[46] William W. Fischer III, *The Trouble With* Lucas, 45 STAN. L. REV. 1393, 1393 (1993) (critiquing Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)).

[47] *Id.*

[48] *Id.* at 1394.

[49] *Id.* at 1403–05.

[50] *Id* at 1405–08.

[51] Fischer, *supra* note 46, at 1408–09.

of Scalia's inconsistencies is uncertain, "one possibility is that Justice Scalia has not adequately thought through the foundations of his constitutional theory."[52]

Professor John Humbach in his article, "*'Taking' the Imperial Judiciary Seriously: Segmentating Property Interests and Judicial Revision of Legislative Judgments*,"[53] also focuses attention on Justice Scalia's jurisprudence. For instance, Professor Humbach points out an ironic temporal juxtaposition:

> On the day the Supreme Court decided *Lucas v. South Carolina Coastal Council*, Justice Antonin Scalia, who wrote the *Lucas* majority opinion, declared with plain chagrin: "The Imperial Judiciary lives." He criticized his "unelected, life-tenured" colleagues in the strongest terms for allowing the Court to succumb to the "more natural direction" of its temptation—the direction of "systematically eliminating checks upon its own power." He cited the fears of Lincoln that "if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that imminent tribunal."[54]

The real irony is that Justice Scalia's opinion in *Lucas* is an example of superactive, categorical judicial review.[55] Thus, on the very day that Justice Scalia laments and criticizes "judicial imperialism," Scalia too was arguably a judicial imperialist.[56]

Subjectivity and inconsistency in Supreme Court land-use jurisprudence are nothing new. As I pointed out in my earlier "*Presumption*

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[52] *Id.* at 1397.

[53] *See* John A. Humbach, *"Taking" The Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments*, 42 CATH. U. L. REV. 771 (1993).

[54] *Id.*

[55] For a discussion of Justice Scalia's superactive, categorical review see Robert J. Hopperton, *Standards of Judicial Review In Supreme Court Land Use Opinions: A Taxonomy, an Analytical Framework, and a Synthesis*, 51 WASH. U. J. URB. & CONTEMP. L. 1, 67 (1997).

[56] Judicial activism is a vague, open-ended term. To measure degrees of judicial activism, many dimensions or elements may be relevant. I will propose in an upcoming article the following ten dimensions as possible measuring devices of the phenomenon of judicial activism: 1) Standards of Judicial Review; 2) Treatment of Non-Judicial Decision; 3) Attitude Toward Non-Judicial Decision-Maker; 4) Treatment of Prudential Doctrines (Standing, Ripeness, etc.); 5) Treatment of Relevant Precedent; 6) Treatment of Relevant Constitutional Provision; 7) Judicial Policy-Making; 8) Judicial Identification of Alternative Policy-Maker; 9) Judicial Specificity Regarding Policy-Making; and 10) Treatment of Remedial Issues. Applying these ten dimensions to the *Lucas v. South Carolina Coastal Council* majority opinion leads to a conclusion that in *Lucas* Justice Scalia was highly activist on most of the ten measures and produced perhaps the most activist opinion in the history of Supreme Court land-use jurisprudence.

of Validity" article,[57] they have been present since early Supreme Court zoning cases such as *Village of Euclid v. Ambler Realty Co.*[58] and *Nectow v. City of Cambridge.*[59]

The Supreme Court in *Euclid* held that "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."[60] Implicit in the *Euclid* holding is the placement of the burden of proof on the party challenging the zoning ordinance.[61] The Court expressly defined the level or standard of proof that the challenger must overcome: if the law's validity is "fairly debatable," then the law must stand.[62]

Interestingly, in his *Euclid* majority opinion, Justice George Sutherland cited to *Radice v. New York* regarding the validity of legislative zoning classifications.[63] *Radice* was not a land-use case. Rather, *Radice* dealt with due process and equal protection challenges to a New York statute prohibiting night employment of women in restaurants.[64] In *Radice*, Sutherland's discussion of the presumption of validity is more detailed than his one-sentence holding in *Euclid*:

> The legislature had before it a mass of information from which it concluded that night work is substantially and especially detrimental to the health of women. . . . Where the constitutional validity of the statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts established be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker. The state legislature here determined that night employment of the character specified, was sufficiently detrimental to the health and welfare of women engaging in it to justify its suppression; and, since we are unable to say that the finding is clearly unfounded, we are precluded from reviewing the legislative determination.[65]

In *Euclid*, Justice Sutherland relied on this more extensive discussion that recognizes separation of powers considerations, the ability

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[57] *See* Hopperton, *supra* note 5, at 306–10.
[58] 272 U.S. 365 (1926).
[59] 277 U.S. 183 (1928).
[60] *Euclid*, 272 U.S. at 388 (citing Radice v. New York, 264 U.S. 292, 294 (1923)).
[61] *See id.*
[62] *Id.*
[63] *Id.* (citing *Radice*, 264 U.S. at 294).
[64] *Radice*, 264 U.S. at 293.
[65] *Id.* at 294–95.

of the legislature to generate a mass of information, and an established factual basis for the legislative judgment, as contributing factors to the Supreme Court's decision to defer to the New York state legislature.[66] Justice Sutherland mentioned the "fairly debatable" standard of proof and, significantly, indicated that because the Supreme Court was unable to say that the legislative finding was not a "valid exercise of authority" it could not invalidate the New York legislation.[67]

The *Radice* and *Euclid* opinions established the model for a deferential standard of judicial review of local land-use decisions.[68] The *Euclid* model starts with the presumption of validity and includes burden of proof and standard of proof components.[69]

The *Euclid* presumption of validity approach articulated by Justice Sutherland soon created problems in later cases for Justice Sutherland and the rest of the United States Supreme Court. In its 1928 decision in *Nectow v. City of Cambridge*, with Sutherland again writing for the majority, the Supreme Court considered the reasonableness of a multiple-family residential zoning classification as applied to a portion of plaintiff Nectow's property.[70] Nectow's property was located between single-family residential and other land zoned for and being used for industrial purposes.[71] In other words, Cambridge had created a buffer zone between two incompatible zones—a widely accepted zoning technique.[72]

Even though the Court was dealing with a legislative classification, Justice Sutherland indicated that a "court should not set aside the determination of public officers in such a matter unless it is clear that their action [is unreasonable]."[73] Ironically, however, the Court invalidated the Cambridge regulation because the "invasion of the property

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[66] *Euclid*, 272 U.S. at 388.

[67] *Id.* at 388–89, 397.

[68] *See id.* at 391–95.

[69] *See id.* at 387, 395–96.

[70] Nectow v. City of Cambridge, 277 U.S. 183, 185 (1928).

[71] *Id.* at 186.

[72] A buffer zone is "a strip of land, identified in the zoning ordinance, established to protect one type of land-use from another with which it is incompatible. Buffer zones may either be shown on the zoning map or described in the ordinance with reference to neighboring districts. Where a commercial district abuts a residential district, for example, additional use, yard, or height restrictions may be imposed to protect residential properties." MICHAEL J. MESHENBERG, THE LANGUAGE OF ZONING: A GLOSSARY OF WORDS AND PHRASES 6 (1976).

[73] *Nectow*, 277 U.S. at 187–88 (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)).

of plaintiff in error was serious and highly injurious . . . ."[74] Conspicuously absent from Justice Sutherland's opinion was discussion of the *Euclid* presumption of validity, burden of proof, or the "fairly debatable standard."[75] Justice Sutherland's avoidance of these standards was particularly interesting in view of the Massachusetts Supreme Judicial Court's adherence to the *Euclid* standards in upholding the reasonableness of the Cambridge buffer zone:

> If there is to be zoning at all, the dividing line must be drawn somewhere. There cannot be a twilight zone. If residence districts are to exist, they must be bounded. In the nature of things, the location of the precise limits of the several districts demands the exercise of judgment and sagacity. There can be no standard susceptible of mathematical exactness in its application. Opinions of the wise and good well may differ as to the place to put the separation between different districts. Seemingly there would be great difficulty in pronouncing a scheme for zoning unreasonable and capricious because it embraced land on both sides of the same street in one district instead of making the center of the street the dividing line. . . . No physical features of the locus stamp it as land improper for residence. Indeed, its accessibility to means of transportation, to centers of business, and to seats of learning, as well as its proximity to land given over to residence purposes, give to it many of the attributes desirable for land to be used for residence. . . . Courts cannot set aside the decision of public officers in such a matter unless compelled to the conclusion that it has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety, or the public welfare in its proper sense. These considerations cannot be waived with exactness. That they demand the placing of the boundary of a zone one hundred feet one way or the other in land having similar material features would be hard to say as matter of law. . . . The case at bar is close to the line. But we do not feel justified in holding that the zoning line established is whimsical, without foundation in reason.[76]

The Massachusetts Supreme Judicial Court had, in effect, faithfully applied and administered the *Euclid* presumption of validity, burden of proof, beyond fair debate standard.[77] While that court may have had doubts about the legislative judgment, that judgment was not

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[74] *Id.* at 188–89.

[75] *See id.* at 185–88.

[76] Nectow v. City of Cambridge, 157 N.E. 618, 620 (Mass. 1927), *rev'd*, 277 U.S. 183 (1928).

[77] *See id.*

clearly unfounded.[78] The *Nectow* opinion written by Justice Sutherland, on the other hand, engaged in less deferential and more active scrutiny in invalidating the legislative judgment, even though there was obviously fair debate about reasonableness.[79] As a result, the *Nectow* decision generated confusion because the *Euclid* approach was not overruled, although *Nectow* implicitly called *Euclid* into question and, without explanation, introduced a new, unarticulated, heightened level of judicial review.[80]

The Supreme Court's unexplained change of position to a more heightened scrutiny of legislative decision-making muddied the waters regarding the appropriate standard of judicial review in zoning cases. The uncertainty about judicial review standards and the presumption of validity continued without clarification, as the United States Supreme Court did not take another zoning case for almost fifty years.[81]

V. Democracy, Distrust, and *Disclosure*

> The *disclosure principle* is that justices avow the true grounds of decision.[82]

Judicial review is "a counter-majoritarian force" in our democracy.[83] The personal predilections and the web of subjectivity[84] identified by both Justices themselves and by professional critics of the Supreme Court heighten the distrust, and lead directly to the search for rules of limitation, for a basis for legitimacy, and for a set of constraints. This search in turn generates the sound and fury of an endless series of "choices"[85] among constitutional theories and methods of constitutional interpretation. Professors Mandelker and Tarlock's presumption-based approach for judicial review of land-use regulation adds one more choice.

What I present is neither another theory nor another choice but rather a modest proposal to help approach the perhaps "intractable"[86]

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[78] *See id.*

[79] *See* Nectow v. City of Cambridge, 277 U.S. 183, 188–89 (1928).

[80] *See id.*

[81] The next zoning case decided by the Supreme Court was *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

[82] This sentence is a paraphrased version of a sentence in an article by Judge Richard A. Posner, *Jurisprudence of Skepticism*, 86 Mich. L. Rev. 827, 864 (1988).

[83] Bickel, *supra* note 40, at 16.

[84] *See supra* Section IV.

[85] *See supra* Section II.

[86] Mandelker and Tarlock conclude the following in their recent reply:

problem of standards of judicial review. My suggestion is that there should be an established and entrenched expectation that Justices explicitly disclose the standards of judicial review that they are adopting whenever they review non-judicial public decision-making such as a local legislative or administrative land-use decision. More specifically, the Justices should disclose the premises and reasoning processes behind their conclusions and the implications and details related to their deployment of a given standard of judicial review, whether it be deferential, heightened, activist, or categorical judicial review,[87] whether it entails minimal, intermediate, or strict scrutiny. As one of the critical dimensions of judicial review,[88] the standard of judicial review employed by a Justice deserves special attention. This choice guides the Justices' review and disposition of the various substantive issues on the merits.

Let me provide a context for the disclosure principle. First, as I have said earlier, it is not new. Judges already observe an established and entrenched obligation to write opinions justifying their decisions on substantive issues. This is a long-recognized convention that judges write opinions explaining and justifying their decisions in terms of legal precedents and principles.[89] This convention traditionally extends only to the judges' decisions on substantive issues on their merits. The expectation that judges write opinions and provide reasons has a long history that was strongly reinforced by proponents of the Harvard Legal Process School,[90] most particularly in the influential, but until recently not published, work of Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*.[91] As Hart and Sacks suggest, the judge must

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> The ultimate issue that land-use challenges raise is, of course, what is the appropriate level of judicial scrutiny of a local legislative or administrative decision? Based on our collective seventy-plus years of struggling with land-use controls law, we find this an almost intractable question which can be approached but not "solved."

Mandelker & Tarlock, *supra* note 1, at 107. A significant reason why the appropriate level of judicial scrutiny is "almost intractable" is, I would submit, the courts' lack of candor, clarity and consistency when dealing with standards of judicial review.

[87] *See* Hopperton, *supra* note 55.

[88] *See supra* note 56.

[89] For a history of the judicial function in the administration of justice in England, see R.J. WALKER, THE ENGLISH LEGAL SYSTEM 183–84 (2d ed. 1985).

[90] KUKLIN & STEMPEL, *supra* note 8; *see generally* G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973).

[91] *See generally* HENRY M. HART, JR. & ALBERT M. SACHS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge & Phillip P. Frickey eds., 1994).

do more than state his conclusions; unless the judge provides a "reasoned elaboration" for his conclusion:

> The parties will have no idea of the basis of his decision; and the losing party, being left in the dark may be harder to convince that the decision is just. . . . Perhaps even more important, other private persons will have no aid in planning future conduct.[92]

Later, in discussing the topic "Reasoned Decision as Integral in the Concept of Adjudication,"[93] Hart and Sacks discuss the need for a judicial decision, if it is to be rational, to be based on "some rule or principle or standard,"[94] and then conclude that "if the decision is not disciplined by the effort to relate conclusions to premises of general applicability, then it must necessarily depend on an *ad-hoc* judgment."[95]

My premise is that disclosure of standards of judicial review, i.e., reasoned elaboration of those standards' creation and use by the Justices, will enhance the clarity, consistency, and integrity of land-use jurisprudence.[96] This use of disclosure can help reconcile the exercise of a power by an unelected, life-tenured judiciary with the majoritarian foundations of our political system. Through the crucible of disclosure, discussion, professional criticism, and debate, a better, less "intractable," land-use jurisprudence can emerge. I would implore the Justices to embrace and practice disclosure and reasoned elaboration regarding their standards of judicial review.[97]

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[92] *Id.* at 357.

[93] *Id.* at 643.

[94] *Id.* at 644.

[95] *Id.*

[96] A jurisprudential skeptic such as Judge Richard Posner suggests that books dealing with constitutional theory and methods of constitutional interpretation such as Ely's DEMOCRACY AND DISTRUST operate under "considerable handicaps—1) judges and constitutional orders are poorly informed about their subject matter—a complex of political, social, and economic questions;" and 2) the fact that most judicial decisions today are written by law clerks just out of law school. The disclosure principle would obligate justices themselves to do more, i.e., explain their thinking about judicial review. In order to meet this obligation, I believe that a justice would first have to get more involved with the political, social, and economic facts that would justify his or her adoption of a given standard of judicial review and, second, justices would need to master—to a much greater extent that is evident in any recent Supreme Court land use cases—what professors and professional critics of constitutional law teach, study, and publish about the available "constitutional choices" that confront them.

[97] The reaction of a second-year law student to the disclosure/reasoned elaboration principle was the following comment: "Every first-year law student understands this concept, i.e., that a justice whether writing a majority, concurring, or dissenting opinion would have an obligation to "IRAC" the problem of standards of judicial review." After-class conversation with Elisabet K. Sandberg, Second-Year Law Student, University of Toldeo College of Law (Sept. 1996).

VI. A USEFUL EXAMPLE OF *DISCLOSURE: CITY OF CLEBURNE V. CLEBURNE LIVING CENTER*

Candor requires me to acknowledge the particular factors that justify invalidating Cleburne's zoning ordinance under the careful scrutiny it today receives.[98]

—Thurgood Marshall

In a recent article,[99] I provide a taxonomy and an analytical framework for one dimension of Supreme Court judicial review of land-use regulations i.e., the standards of judicial review—those standards that the Court creates and uses to guide its review and disposition of particular land-use cases on their merits. Second, I apply the taxonomy and framework to the vast number of land-use opinions authored by Supreme Court justices. In applying the taxonomy and the framework to the more than 120 Supreme Court land-use opinions, it is quite clear that the "no set formula"[100] label is perhaps as applicable to standards of judicial review as it has been applicable to the takings issue. However, "no set formula" is probably an understatement regarding judicial review. Subjectivity, analytical laxness, unelaborated premises, novel use of history, and inconsistency are more accurate descriptions.[101] While undoubtedly there are several standards of judicial review apparent in Supreme Court land-use jurisprudence, there neither is consensus on their underlying principles, their applications, or their policy bases, nor is there any recognized expectation of disclosure or of reasoned elaboration regarding this dimension of judicial review.

This state of affairs perhaps is, in some ways, a positive. Standards of judicial review are not frozen into some Procrustean Mold and creative new approaches can be tried, although those new approaches sometimes lead to rigid new *per se* rules.[102] In this disarray, the Court can react flexibly to changing times and new demands.

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[98] City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 460 (1985).

[99] *See generally* Hopperton, *supra* note 55.

[100] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). Justice William Brennan remarked in a phrase that has become an often-used description of Supreme Court treatment of the Takings Issue that, "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require" compensation. *Id.*

[101] *See* Hopperton, *supra* note 55, at 1, 74.

[102] *See id.* at 75.

However, there is a distinct downside to the confusion. It invites the knight-errant on a crusade whether he or she be a liberal protecting fundamental rights or a conservative promoting property rights. The already present "counter-majoritarian difficulty" is exacerbated. Personal predilections can dominate and be disguised at the same time. Moreover, a reading of the massive writings in the realm of constitutional theory published since Alexander Bickel's *The Least Dangerous Branch*[103] in 1962 indicates that no workable and generally accepted substantive means of constraining judicial discretion has emerged, or is likely to emerge soon.[104]

To address this confusion, I have suggested that an "entrenched expectation" be established to the effect that Justices would in every opinion engage in "reasoned elaboration"[105] of their selection of a standard of judicial review. This procedural expectation would obligate Justices to *disclose* their premises for deploying deferential judicial review, or heightened judicial review, or activist judicial review, etc., and to set forth their reasoning process with regard to this dimension of the judicial decision-making process.

The disclosure of reasons for a Justice's jurisprudential thinking, i.e., reasoned elaboration, is a core principle of the legal process school of jurisprudence.[106] It is a technique advanced as a useful constraint in a democratic society on judicial imperialism and personal judicial predilections. While reasoned elaboration, or disclosure of reasons, has its limitations, and has been labeled obsolescent[107] by some, I would assert that, in the welter of conflicting, contradictory, and often *un*elaborated Supreme Court approaches to judicial review, reasoned elaboration retains contemporary value.

The colloquy undertaken by Justices Byron White, John Paul Stevens, and Thurgood Marshall in *Cleburne*[108] is a useful example. In that case, there were sharp disagreements, points and counter-points, and critical evaluations of opposing positions regarding competing standards of judicial review. The Justices engaging in that colloquy disclosed, informed, and educated, while also advancing and maturing

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[103] BICKEL, *supra* note 40.

[104] *See generally id.*

[105] For a discussion of "reasoned elaboration," see G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 287–94 (1973).

[106] *Id.* at 299.

[107] *Id.*

[108] City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 470 (1985).

their own thinking and analysis. When compared to the silence of Justice Sutherland in *Nectow*[109] or the novel, hyper-activism of Justice Scalia in *Lucas*,[110] the combination of fully engaged opinions in *Cleburne* stands out in refreshing and constructive contrast.

If in a democratic society, the premise of distrust does attach to the judiciary, then the type of discussion and disclosure undertaken in *Cleburne* can operate as a modest but useful constraint on Justices as they select a standard of judicial review.

VII. Conclusion: What *Disclosure* Can Do

In Chapter Five of his book, *Other People's Money*,[111] Louis Brandeis (later Justice Brandeis) discussed what disclosure—Brandeis called it "publicity"—can do.

> WHAT PUBLICITY CAN DO
> Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman. And publicity has already played an important part of the struggle against the money trust. The Pujo Committee has, in the disclosure of the facts concerning financial concentration, made a most important contribution toward obtainment of the New Freedom. The battlefield has been surveyed and charted. The hostile forces have been located, counted and appraised. That was a necessary first step—and a long one—towards relief. The provision in the Committee's bill concerning the incorporation of stock exchanges and the statement to be made in connection with the listing of securities would doubtless have a beneficent effect, but there should be a further call upon publicity for service. That potent force must, in the impending struggle, be utilized in many ways as a continuous remedial measure.[112]

Disclosure can be a helpful, continuous, remedial measure in land-use jurisprudence too. It can help in searching out the web of subjectivity, it can help locate, count, and appraise possible personal predilections of Justices. Erratic subjectivity of judgment, analytical laxness, intellectual incoherence, the imagining of too much history, and the manipulation of technical requirements will be harder to disguise. Dis-

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[109] Nectow v. City of Cambridge, 272 U.S. 183 (1928).

[110] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[111] *See* Louis D. Brandeis, Other People's Money and How the Bankers Use It 92–109 (1913).

[112] *Id.*

closure can be a continuous, remedial measure to combat the possible excesses of a counter-majoritarian force.

Disclosure, however, is obviously no panacea. Skeptics will say it would be little more than a theoretical or academic limitation on Justices,[113] and that clever, manipulative, intellectually dishonest justices can easily circumvent a disclosure obligation to achieve their desired ends. However, an established and entrenched obligation to disclose would up the ante, it would add another filter, it would make judicial sophistry that much more difficult. It would provide another petard upon which Justices might hoist themselves. It would make Justices more self-conscious. It would add another measure for law professors and professional critics to use in the marketplace of jurisprudential thought.[114] It would be an aide in the dialectical processes. In short, disclosure by a court of its reasons and reasoning process regarding standards of judicial review is a protection against an unbridled judiciary. In the face of such an expectation or obligation, any court, trial or appellate, that does not justify the standards it creates and uses to guide its review and disposition of the substantive issues it is deciding on their merits would be, and should be, subject to sustained professional criticism.

Disclosure—Panacea, no; helpful continuing remedy, yes. Two cheers for Truth in Jurisprudence.

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[113] *See generally* Arthur S. Miller, *In Defense of Judicial Activism*, *in* SUPREME COURT ACTIVISM AND RESTRAINT 176 (Steven C. Halpern & Charles M. Lamb eds., 1982).

[114] As Judge Richard A. Posner asserted:

> The effectiveness of professional critics in constraining judicial behavior is enhanced by the tradition (now on the wane in the federal courts of appeals) that the judge must explain his decision in a published opinion, which if it falls below professional expectations of principled judicial decision making may become a focus of searing criticism.

RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 22 (1985).